



## **BRIEF IN SUPPORT OF PETITION.**

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### **OPINION OF THE COURT BELOW.**

The opinion of the Circuit Court of Appeals for the Seventh Circuit (not yet reported) appears in full in the record (R. 219). No formal opinion was rendered by the District Court.

### **JURISDICTION.**

The jurisdiction of this Court is invoked as set forth in the petition for the Writ of Certiorari.

### **STATEMENT OF THE CASE.**

The indictment (R. 2) charged evasion of military service by Petitioner George Aloisio, and that Petitioner William Aloisio (his brother) and defendant Frank Cerone aided and abetted him by paying (Bill of Particulars R. 11) \$500.00 to Albert E. Stephenson, Chief Specialist, USNR, assigned to the Armed Forces Induction Station at Chicago for the purpose of inducing him to make false entries on the records of George Aloisio, and by means thereof, obtain his rejection.

The chronology of events is so important in the understanding of this case and the Petitioners' points, that this statement is set out by dates.

#### **Early in March, 1945:**

Frank Cerone and Albert E. Stephenson met and talked regarding the obtaining of rejections and special assignments by Stephenson (R. 42).

### **Later in March:**

Stephenson obtained a rejection apparently by merely suggesting to a medical officer at the Induction Center that a certain person who had previously been accepted, had a record of multiple arrests. He was recalled and apparently actually, and conceivably properly, rejected by a person authorized to do so. Cerone paid Stephenson \$1000.00 for this rejection (R. 44).

### **Near the end of March:**

Stephenson had two conversations with Chief Petty Officer John Phillip Curran, also assigned to the Induction Center, regarding participation by Curran in a scheme to obtain additional rejections (R. 72).

### **April 3rd:**

Curran informed his superiors of the second conversation with Stephenson, and he was instructed by them and the F.B.I. to proceed with the scheme and, according to Curran (R. 87), get rejected anyone Stephenson or Cerone suggested. F.B.I. Agent Logue told Curran (R. 101) to put the rejection stamp on George Aloisio's induction records, called his "buck sheet." It was after Curran's entry into the scheme at the instance of the Government that the scheme was enlarged to include Curran's participation, the stamps were obtained (R. 46, 74, 75), and that another necessity of the scheme, a private office, was provided (R. 65).

### **April 12th:**

An inductee by the name of Alex was allegedly rejected. This rejection was by Curran who imposed the rejection stamp and the false supporting data on the buck sheet (R. 75). Alex was the first one under the new plan (R. 75). Curran was not authorized to impose the rejection.

tion stamp (R. 39) or to make diagnosis for rejections (R. 41).

**April 23rd:**

Stephenson was taken into custody and he confessed to the F.B.I., and he, as well as Curran, was instructed to proceed with any additional persons mentioned by Cerone, as had been done in the Alex matter, and to report to them (R. 47).

**May 10th:**

Stephenson met petitioner William Aloisio and Cerone in the Brevoort Hotel. This was the first time that the name of either of the Aloisios was heard in, and their first contact with, the case (R. 58, 63, 87). Stephenson testified that he met William Aloisio and Cerone and that he was offered \$500.00 by Cerone to obtain the rejection of George Aloisio (R. 47, 48). William Aloisio testified that so far as he was concerned, the meeting was accidental, and that all he requested of Stephenson was that his brother be put in radio (R. 122). Stephenson's regular duties (R. 42) were to assign registrants to the various branches of the service; Curran's duties were to screen registrant for radio work (R. 71); Cerone had said to Stephenson (R. 43) that he might have some friends he would want assigned especially in the service (as distinguished from a rejection).

**May 11th:**

George Aloisio and Cerone met Curran and Stephenson at the Van-Wells Tavern across the street from the Induction Center (R. 76). Aloisio and Curran went across the street and into the Induction Center for a so-called dress rehearsal. Nothing was said about a rejection to George Aloisio, but merely, "You go with Curran. He will show you how to handle yourself tomorrow" (R. 51). No con-

versation was had with George Aloisio which would indicate that he knew that he was to be rejected rather than merely assigned to radio work.

**May 12th:**

George Aloisio reported to the Induction Center, and Curran stamped his buck sheet "Rejected by the Armed Forces"—and made supporting entries (R. 78). Neither of the Aloisios was consulted at any time with regard to the use of the rejection stamp (R. 86), or the making of the supporting entries.

The record is barren of any testimony or evidence of a rejection or evasion of service by George Aloisio other than this "rejection" by Curran.

**Later in May:**

Two more alleged rejections were put through in substantially the same manner (R. 146).

**May 26th:**

Curran, whose acts up to this point had been 100 percent under the direction of the Government, became so apprehensive of his participation in this manufacture of criminals that he said "I better see a lawyer" (R. 85). (This was apparently at or after the fourth alleged rejection.)

**SPECIFICATIONS OF ERROR.**

(1) The Circuit Court of Appeals erred in failing to hold that the Government had committed an entrapment as a matter of law.

(2) The Circuit Court of Appeals erred in failing to hold as a matter of law that it was entrapment where the Government afforded the opportunity and furnished the instrumentalities of, and directed and executed the crime,

where the defendants had no means with which to commit the crime, had no record of having committed such crime previously, and were not engaged in an enterprise having as its object the commission of such crimes.

(3) The Circuit Court of Appeals erred by holding that under *United States v. Sorrells*, 287 U. S. 435, opportunities and facilities for the commission of crime and artifice and stratagem may be employed to lure a citizen into, as well as catch him in the commission of, a crime, who was theretofore innocent and who had not and who was not engaged in a criminal enterprise.

(4) The Circuit Court of Appeals erred as a matter of law in holding that intent and the scheme originated in the minds of the defendants within the meaning of entrapment law and the *Sorrells* case because they participated in the one offense charged; whereas this offense and their entry into the trap postdated by many weeks the laying of the trap by the Government for any and all citizens who might, in all innocence up to that point, come in contact with the trap so laid.

(5) The Circuit Court of Appeals erred in holding that it was not error for the trial court under the evidence in this case to refuse an instruction that acts committed by Government Agents which were necessary to complete the crime, could not be imputed to the defendants.

## SUMMARY OF ARGUMENT.

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### Point I.

The holding of the Circuit Court of Appeals that the Government can afford opportunities and furnish facilities for a crime and use artifice and stratagem to induce a person to commit a crime, who is not engaged in a criminal enterprise and who has never been charged or suspected of a crime, much less a crime similar to the one into which he was entrapped, is in conflict with the decision of this Court in *U. S. v. Sorrells*, 287 U. S. 435.

### Point II.

The holding of the Circuit Court of Appeals that a defendant could be convicted even though to complete the offense it was necessary to impute to him an act of the Government which constituted an essential element of the crime charged is in conflict with the decision of the Sixth Circuit in *Sherman v. U. S.*, 10 Fed. 2nd 17.

## ARGUMENT.

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### Point I.

**The holding of the Circuit Court of Appeals is in conflict with a decision of this Court on the law of entrapment.**

Cerone and the petitioners are not *in pari delicto*. The petitioners were for the first time brought into this scheme more than a month after the Government was actively participating (R. 103). They had no record of the commission of similar crimes, nor had they pursued any course of conduct which would even justify the leaving of a trap open into which they might fall, much less using artifice and stratagem to have them commit the crime as well as catch them.

It is contended that the Government conceived this series of crimes, as Stephenson's original scheme was nothing more than taking advantage of the record of an inductee as he found it (R. 44, 59). After Curran (who was in all respects and at all times an agent of the Government) entered the case, the scheme was enlarged to include his active participation; the rejection stamps, which were thereafter obtained (R. 46, 61, 62, 74, 75) and the data supporting the stamps; likewise, the private office (R. 65); also, a dress rehearsal (R. 87). These instrumentalities of the crime were furnished by the Government. The crime could not have been committed without them. The petitioners at no time had them in their control or possession. The Government tried the new scheme out on a certain Alex (R. 75) and it worked. At least one other and possibly two more victims were obtained (R. 146) before



the petitioners came in contact with the trap. They had neither been seen nor heard of in connection with the first two and possibly three entrapments (R. 58, 63, 87).

George Aloisio was an industrious boy with two and one-half years at Wright College and a record of employment by the Army Signal Corps (George Aloisio Exhibits 1 (R. 176) and 2 (R. 180), admitted (R. 121) and (R. 122), respectively). The Army had previously requested his deferment (R. 121). He was "nervous" at the dress rehearsal (R. 51). There was no evidence of prior violations of any kind, and he produced character witnesses (R. 119-120).

William Aloisio had no previous record, and he testified (R. 122) that he did not solicit the rejection of his brother George, but merely wanted him in radio work. Stephen's unsupported testimony of his one meeting with William Aloisio (R. 47) is the sole evidence of William Aloisio's participation in the alleged crime.

There was no evidence that either of the petitioners originated the criminal design or was engaged in crimes similar to the one charged, or in a criminal enterprise, or that they were otherwise than wholly innocent prior to their entrapment in this case. Did not this Court have such circumstances in mind when it said in *Sorrells v. U.S.*, 287 U. S. 435-442, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute"?

It is appreciated that in the *Sorrells* case, this Court was primarily passing on whether the trial court should have instructed on entrapment, but even a cursory reading of this opinion, including the concurring opinions, indicates that the Court was attempting to lay down a philosophy to govern entrapment cases. Certainly if this

Court intended to mean "those engaged in criminal enterprises" when it used those words, then the decision of the Seventh Circuit Court of Appeals is in conflict with the intent and philosophy of this Court. The petitioners in this case were not engaged in a criminal enterprise. Certainly those words can not be interpreted to mean that the Government can afford opportunities and facilities for the commission of an offense and apply artifice and stratagem to catch anyone engaged in the one offense brought about by the Government and with which they stand charged.

Cerone may have been engaged in a criminal enterprise in his repeated dealings with Stephenson; not so, these petitioners. It may be argued by the Government that Cerone and Stephenson conceived the criminal design, if no distinction is made between the first and second schemes. No one would contend that the Aloisios originated either.

These petitioners had no reasonable chance to escape the trap set and manipulated (R. 60-66) by the Government when Curran was instructed and ordered "to bring about his rejection, and I was following orders" (R. 87). Curran was so abashed by this shocking manufacture of criminals that he was thinking in terms of a lawyer for himself (R. 85), and Stephenson was trying to earn leniency, even freedom, for his confessed crimes. If any one of this series of offenses had fallen through for any reason, Stephenson could assume that he would be blamed for a "tip off." The Government injudiciously placed the enforcement of the law in the hands of these two sailors, one of criminal tendencies and the other inexperienced in law enforcement. The result is that four boys of the total of five (R. 146) are headed for the penitentiary, who might otherwise have lived useful and conceivably heroic lives.

The only possible excuse that appears for the Government to continue to manufacture criminals out of otherwise loyal citizens is that, in his conversation with Curran, Stephenson said that he (or Cerone) had six persons in mind (R. 72). If in attempting to arouse the cupidity of Curran, he had happened to say that he had a hundred persons in mind, would the Government have been justified in continuing to make criminals to that extent? If so, why stop there?

Surely, the *Sorrells* case is not justification for the Government to furnish the gun, the ammunition, pull the trigger, and insofar as the Aloisios were concerned, conceive all three. The Circuit Court of Appeals has by its decision interpreted the *Sorrells* case to sanction the use of artifice and stratagem to have a person theretofore innocent commit a crime, whereas this Court sanctioned the use thereof to catch a person already engaged in a criminal enterprise.

We cannot be proud of persons who try to evade service, including George Aloisio if he in fact did try. Neither can we be proud of a governmental agency for conduct such as this, whether it be the result of an excess of youth and inexperience with a craving for theatrics, as is believed the case here, or the result of sadistic and brutal government such as might be found in some countries in the Old World.

The petitioners moved for a directed verdict on the ground of entrapment at the close of the Government's case (R. 114), at the close of all the evidence (R. 123), and renewed the point in the Circuit Court of Appeals (AE. R. 188).

## Point II.

**The holding of the Circuit Court of Appeals that acts of the Government can be imputed to a defendant is in conflict with a decision of the Circuit Court of Appeals for the Sixth Circuit.**

Petitioners asked for the following instruction (R. 161):

“If the jury finds from all the evidence that the Government committed any act essential to the completion of the crime, they should find the defendants not guilty.”

Certainly this is good law. The facts justified such an instruction, but it was refused and no comparable instruction was given (R. 152). It is error to refuse an instruction good in law and based on the evidence introduced.

The offense charged against George Aloisio was that “he did evade” military service, as distinguished from an attempt to evade which is not and could not have been charged under the statute used. A completed act of evasion was charged. Those acts which, if done by Aloisio, would certainly have supported the indictment, such as making the false entries and stamping the buck sheet “Rejected by the Armed Forces,” were performed by the Government. The Government committed these acts and thereupon says that they were committed by George Aloisio and with criminal intent. The Government imputes both the act and the intent to the defendant.

This case is not comparable to an evasion or an act looking toward an evasion by the filing of a false affidavit or the making of false statements by an inductee. In such cases, the inductee would have himself committed the evasive act with the necessary intent. Here, if all the evidence of the Government be taken at face value, George Aloisio only presented himself at the Induction.

Station as he was ordered to do. All else was knowingly done by Government Agents. The petitioners were not charged with the substantive offense of bribery or conspiracy to bribe where the act of giving a bribe would have been sufficient regardless of the state of mind or co-operative acts of the person sought to be bribed.

The failure of the Circuit Court of Appeals to hold that the instruction requested should have been given evidences a lack of uniformity and a conflict in the administration of criminal law between the Seventh and the Sixth Circuits, as evidenced by a decision of the latter in *Sherman v. U. S.*, 10 Fed. 2nd 17. The Sixth Circuit in the *Sherman* case held that the intent of a government agent could not be imputed to the defendant, and reversed and remanded. Certainly if intent cannot be imputed to a defendant, it should be even more certain that an act could not be.

### CONCLUSION.

Other assignments of error were made in the appeal to the Circuit Court of Appeals (R. 188), which were believed sound, but which, due to the circumscribed character of this petition, are not presented here. It is conceivable, however, that the Court might care to look at them by reason of the ever present possibility of error where trials involve war crimes and are held in the heat and passion of war. (Could the trial judge, even granting his effort to be fair, have closed his mind to his own loss of two sons in the war when passing on the motions involving the points raised here?)

It is contended that the principles and philosophy of the law of entrapment announced in the *Sorrells* case, are in conflict with the decision of the Circuit Court of Appeals in this case; that, likewise, a bad case is making bad law

if this decision is permitted to stand imputing to the petitioners the acts of the Government and any intent that the Government might choose to imply from those acts.

It is urged for the reasons stated that the Writ of Certiorari should be granted.

Respectfully submitted,

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and William Aloisio,  
Petitioners.*

**(Appendix follows)**